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Supreme Court of the United States

JOHN H. BREDE,
Appellant,

against

JAMES M. POWERS, as United States Marshal for the Eastern District of New York,
Appellee.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from an order of the United States District Court for the Eastern District of New York, the late District Judge, Hon. Thomas I. Chatfield, presiding, dismissing a writ of *habeas corpus*.

Brede, the appellant, was convicted in said court of a violation of the National Prohibition Act, and sentenced to be imprisoned for sixty days and to pay a fine of $5,000 (pp. 3, 5). He was prosecuted upon an information filed by the United States attorney April 7, 1920 (p. 3). No indictment or presentment by grand jury was ever found (pp. 3, 5). Being committed to the custody

of the marshal, he obtained a writ of *habeas corpus,* alleging that the crime of which he was convicted was an infamous crime within the meaning of the fifth amendment to the constitution for the reason that the court had power, because of the statutes of the United States and state statutes by federal law made applicable to federal prisoners in state penal institutions to sentence him to an infamous punishment, namely, imprisonment at hard labor (p. 4). The writ was dismissed (pp. 5-6), and he appeals.

Specification of the Errors Relied Upon.

Appellant relies upon all the errors assigned, namely:

1. The United States District Court for the Eastern District of New York, erred in dismissing the writ of *habeas corpus* and remanding him to custody.

2. Said court erred in holding that imprisonment in the County Jail of Essex County, New Jersey, is not imprisonment at hard labor.

3. Said court erred in holding that imprisonment in the County Jail of Essex County, New Jersey, for a term of sixty days is not an infamous punishment.

4. Said court erred in holding that the crime for which he was prosecuted and was convicted, as set forth in the record herein, is not an infamous crime within the meaning of the fifth

amendment to the constitution of the United States.

5. Said court erred in holding that the crime for which he was prosecuted and convicted, as set forth in the record herein, can be prosecuted in the United States District Court for the Eastern District of New York, by information and without indictment or presentment by the grand jury.

6. Said court erred in holding that the United States District Court for the Eastern District of New York had jurisdiction to pronounce the sentence and judgment of conviction in the record described.

7. Said court erred in construing and applying the constitution of the United States and particularly the fifth amendment thereto, for the reason said amendment, properly construed and applied, required his discharge from imprisonment, same being pursuant to conviction of an infamous crime without indictment or prosecution by grand jury (pp. 1-2).

Brief of the Argument.

I.

The court has jurisdiction.

The case involves the construction and application of that part of the fifth amendment to the constitution which provides that "no person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." It is involved *primarily* and *directly*. It is *necessary to a decision*. True, it may be necessary *incidentally* to examine and construe certain statutes in order to determine the *incidents*, to fix the *characteristics* of this particular crime, just as it is always necessary whenever a constitutional principle is invoked first to find out exactly what is the character of the thing or event which the constitution is asserted to protect or to forbid; yet, after the statutes defining this crime and fixing its punishment have been examined, it will be necessary to *construe* the constitution and to *apply* it to the particular state of facts which shall have been determined to be before the court. The case cannot be decided until the constitution first shall have been construed and applied.

II.

The order appealed from is erroneous for the reason that appellant was convicted of an infamous crime, that is, a crime for punishment of which the court had power to subject him to an infamous punishment, namely, imprisonment at hard labor, and since there was no indictment or presentment by grand jury, but prosecution on a mere information, the judgment of conviction was void and the writ of habeas corpus should have been sustained.

1.

If the crime of which appellant was convicted was an infamous crime, a trial upon a mere information could not give the court jurisdiction to pronounce judgment, and the judgment which the court attempted to pronounce was void, and subject to collateral attack by *habeas corpus*. We deem it unnecessary to argue this proposition.

Ex parte Wilson, 114 U. S. 417.
Ex parte Bain, 121 U. S. 1.
In re Claasen, 140 U. S. 200.

2.

The construction of the fifth amendment to the constitution is this: an infamous crime is one that carries an infamous punishment; the test does not depend upon the punishment that ultimately happens to be inflicted, but upon the punishment the court *has power* to inflict.

Ex parte Wilson, 114 N. S. 417.
Ex parte Bain, 121 U. S. 1.
Parkinson v. *United States,* 121 U. S. 281.
In re Claasen, 140 U. S. 200.

Imprisonment *at hard labor* is an infamous punishment.

Ex parte Wilson, 114 U. S. 417.
Wing Wong v. *United States,* 163 U. S. 228.
United States v. *Moreland,* 258 U. S. 433.

This is just as true of imprisonment at hard labor in an institution maintained for punishment of minor offenders, such as a "house of correction," "workhouse," or "bridewell," as it is of similar imprisonment in an institution maintained for more serious offenders, such as a "state prison" or "penitentiary."

United States v. *Moreland,* 258 U. S. 433.

3.

Theory of the brief.

Our contention is this: Although the court attempted to sentence appellant to imprisonment in a penal institution in the State of New Jersey (pp. 4, 5), it had no power to do so, and that part of the judgment which specifies such place of imprisonment is void. The court did, however, have power to sentence appellant to imprisonment in a penal institution in the State of New York. Under the New York law, which by federal statute is made applicable to the discipline of federal prisoners in such institutions, imprisonment therein

is imprisonment at hard labor. If we be in error as to the power of the court to sentence appellant to imprisonment in New Jersey, it is not material, for the reason that such imprisonment would likewise be at hard labor.

4.

The power of the court as to the selection of a place of imprisonment.

In the beginning there were no federal jails or prisons. The first penal acts, though empowering the United States courts to punish by imprisonment, did not specify the places of incarceration. It was contemplated that the jails and prisons of the states would be open to federal prisoners.

The first congress (September 23, 1789) adopted a joint resolution:

> "That it be recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their jails to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, *under the like penalties as in the case of prisoners committed under the authority of such states respectively.* * * *" (1 Stat. 96).

The state legislatures generally acceded to this request (8 Op. Atty. Gen. 289, 291 [1857]).

Probably without this expression of congressional intention the United States courts would have been deemed to have the power to select any prison within their territorial jurisdiction open to

them (*Ex parte Geary*, 2 Biss. 485; 10 Fed. Cas. 137, case No. 5293). However, in 1821 (3 Stat. 646) another resolution was adopted which is now Rev. Stat. 5537-5538, which provides:

> "In a State where the use of jails, penitentiaries, or other houses is not allowed for the imprisonment of persons arrested or committed under the authority of the United States, any marshal in such State, under the direction of the judge of the district, may hire, or otherwise procure, within the limits of such State, a convenient place to serve as a temporary jail" (5537).
>
> "The marshal shall make such other provisions as he may deem expedient and necessary for the safe-keeping of the prisoners arrested or committed under the authority of the United States until permanent provision for that purpose is made by law" (5538).

There followed in 1825 (4 Stat. 118) an act now Rev. Stat. 5542:

> "In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose."

In 1835 (4 Stat. 777) came the present Rev. Stat. 5548:

> "Whenever any person is convicted of any offense against the United States which is punishable by fine and imprisonment, or

by either, the court by which the sentence is passed may order the sentence to be executed in any house of correction or house of reformation for juvenile delinquents within the State or district where such court is held, the use of which is authorized by the legislature of the State for such purpose."

In 1864 (13 Stat. 74) was enacted the act, which, with its amendments, is Rev. Stat. 5546:

"All persons who have been, or who may hereafter be, convicted of crime by any court of the United States, including consular courts, whose punishment is imprisonment in a District or Territory or country where, at the time of conviction or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined during the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney-General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the District or Territory where the conviction has occurred; * * *. And the place of imprisonment may be changed in any case when, in the opinion of the Attorney-General, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel and improper treatment: Provided, however, That no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner or because of his treatment, after his conviction and during his term of imprison-

> ment, unless such change shall be applied for by such prisoner, or some one in his behalf."

And in 1865 (13 Stat. 500) came the present Rev. Stat. 5541:

> "In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose."

These last four cited acts must be construed together. It has been held that Rev. Stat. 5564 "may be treated as a proviso to sections 5541 and 5542" (*Ex parte Karstendick,* 93 U. S. 396, 401). It has been decided further that sections 5541 and 5542 define the *only* instances in which a United States court can sentence a prisoner to confinement in a "state jail or penitentiary" within the state, that is, when the statute *requires* hard labor as part of the punishment or when the imprisonment is for more than a year, and, that, therefore, when the sentence is *in terms* to imprisonment merely, for a year or less, the court *has no power* to sentence the prisoner "to a suitable jail or penitentiary in a convenient State * * * designated by the Attorney-General."

In re Mills, 135 U. S. 263.
In re Bonner, 151 U. S. 242.

This is the only statute which permits a prisoner to be sent out of the state (save when imprisonment is to be "one year or more at hard labor" when it may be to a federal prison [26 Stat. 839]), and except where some statute otherwise provides the jurisdiction of the United States District Courts is limited to their territory.

Toland v. *Sprague,* 12 Pet. 300, 328.
Hernden v. *Ridgway,* 17 How. 423.
14 Op. Atty. Gen. 522.

Therefore, unless *In re Mills* and *In re Bonner* are to be overruled, it follows that so much of the judgment of conviction as pretends to designate an institution in the State of New Jersey as the place of imprisonment is void, as being beyond the power of the court.

To what place did the court have power to sentence appellant? Under Rev. Stat. 5548, *supra,* it had the power to sentence him to any "house of correction or house of reformation for juvenile delinquents within the state," providing the state legislature had so authorized (this statute does not apply to *juvenile* offenders; they are provided for by Rev. Stat. 5549), or under Rev. Stat. 5537-5538, to any other place within the state for which the marshal might make provision, except, of course, that under the decisions in the *Mills* and *Bonner* cases it would have to be some place other than the "state jail or penitentiary."

This leads us to an examination of the statutes of the State of New York to ascertain what institutions were "authorized by the legislature" of the state to receive appellant.

The New York Prison Law (L. 1909, Ch. 47):

"§157. *Imprisonment of criminals convicted of crime against the United States.* It shall be the duty of the agent and warden of the state prisons, in accordance with the provisions of section one hundred and fifty-eight, to receive into the said prison and safely keep therein, subject to the discipline of such prison, any criminal convicted of any offense against the United States, sentenced to imprisonment therein, by any court of the United States, sitting within this State, until such sentence be executed, or until such convict shall be discharged by due course of law; the United States supporting such convict, and paying the expenses attendant upon the execution of such sentence."

"§158. *Restrictions on imprisonment of United States prisoners.* It shall not be lawful for the superintendent of state prisons, or the agents and wardens, or managers or superintendents of any of the penal institutions in this state, to hereafter receive or permit to be received therein, any prisoner convicted in the United States courts, held without the State of New York, or in any state court other than that of the state of New York. It shall be lawful for the agents and wardens of the state prisons, and the managers of the reformatories of the state to receive prisoners convicted and sentenced in the United States courts in this state, for one year or more, upon proper contracts made for their care and custody, to be approved by the superintendent of state prisons; but no prisoners sentenced in United States courts in this state, for one year or more, shall be received in any penal institution in this state, except in the state prisons and reformatories as aforesaid."

The state reformatories at Elmira and Napanoch are "state prisons" within the meaning of this act, and for many years the United States courts within the state have sentenced convicts there.

Opinions, N. Y. Atty Gen. (1894), 366.

The county jails of the state are also open to United States prisoners. The New York County Law (L. 1909, ch. 16) provides:

> "§96. *Commitment by United States courts.* Such keeper shall receive and keep in his jail every person duly committed thereto, for any offense against the United States, by any court or officer of the United States, until he shall be duly discharged; the United States supporting such person during his confinement; and the provisions of this article, relative to the mode of confining prisoners and convicts, shall apply to all persons so committed by any court or officer of the United States."

The criminal jails within the City of New York are under the charge of the Commissioner of Correction of the City (New York Charter, L. 1901, ch. 466, §695), and although there seems to be no statute *expressly* authorizing the receipt of United States prisoners therein there is no statute prohibiting it, and as matter of fact they are used for the receipt of federal prisoners awaiting trial, and in times past they have been used for convicted United States prisoners serving their sentences.

5.

A sentence to any penal institution in the State of New York is a sentence to hard labor.

Rev. Stat. 5539 (formerly 4 Stat. 739, Act of June 30, 1834, ch. 63) provides:

> "Whemever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts off the State or Territory in which such jaill or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory."

This statute was recently considered by this court (*Ponzi* v. *Fessenden,* decided March 27, 1922, 66 L. Ed.. 354), where it was said:

> "The section is only one of the many showing the spirit of comity between the state and national governments in reference to the enforcement of the laws of each. To save expense and travel, the Federal government has found it convenient, with the consent of the respective states, to use state prisons in which to confine many of its prisoners, and the Attorney-General is the agent of the government to make the necessary contracts to carry this out. In order to render this duty assumed by the state governments as free from complication as possible, the actual authority over, and the discipline of, the Federal prisoners while in the state prison are put on the state prison authorities. If the treatment or discipline is not satisfactory, the Attorney General can transfer them to another prison, but while they are there they must be as amenable to the rules of the prison as are the state prisoners."

A statute enacted in this "spirit of comity" can hardly be construed by placing a narrow technical construction upon the words "jail or penitentiary." These words were obviously intended to apply to houses of correction and reformatories as well as to state prisons, to jails and prisons maintained by a political subdivision of a state, such as a county or city, as well as to those maintained by a state itself. Indeed, the institution which the learned Chief Justice had particularly in mind was the "House of Correction" at Plymouth, Mass.* It would be totally subversive to discipline in any penal institution, no matter what its nature, to have a *specially favored class* of prisoners within its walls. States would be loath to receive United States convicts upon such terms. At the time of the passage of this act the United States was *wholly* dependent upon the "comity" of the states for the use of penal institutions (there were no federal jails priorto 1891 [26 Stat. 839]) and it is still *largely* dependent, and it could not have been intended to make demand for *unusual* accommodation in any of them. Indeed, it seems that from the very first the states have made for the United States prisoners in their jails "the same regulations as for their own, in the matter of discipline,

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* In Massachusetts there is the state prison at Boston which is the "general penitentiary and prison of the commonwealth" (Gen. Laws 1921, ch. 125, §11), and the commissioners of each county except one are required "to provide a house or houses of correction, suitably and efficiently ventilated, with convenient yards, workshops and other suitable accommodations * * * for the safe keeping, correction, government and employment of offenders legally committed thereto by the courts and magistrates of the commonwealth or of the United States" (*id.*, ch. 126, §8). Prisoners in the state prison "shall be constantly employed" (*id.*, ch. 127, §48). Prisoners in the houses of correction "may be employed," with certain limitations, in such industries as the keeper selects (*id.*, ch. 127, §§50-51).

subsistence and the necessaries of life" (8 Op. Atty. Gen. 289, 291).

That it was intended that federal prisoners in state institutions of whatever character they might be should be amenable to the local discipline is further borne out by the act of February 23, 1887, ch. 213; 24 Stat. 411, §1, providing:

> "It shall not be lawful for any officer, agent, or servant of the Government of the United States to contract with any person or corporation, or permit any warden, agent, or official of any State prison, penitentiary, jail, or house of correction where criminals of the United States may be incarcerated to hire or contract out the labor of said criminals, or any part of them, who may hereafter be confined in any prison, jail, or other place of incarceration for violation of any laws of the Government of the United States of America."

If it had not been contemplated that federal prisoners in lesser penal institutions, such as "jails" or "houses of correction," could be compelled to labor at all, it would have been quite unnecessary to prohibit the hire of their labor. At this time "houses of correction" were expressly approved for the incarceration of *"any* person * * * convicted of *any* offense against the United States *which is punishable by fine and imprisonment, or by either* * * *" (Rev. Stat. 5548).

The statutes of the State of New York, where they authorize the receipt of federal prisoners in state institutions, always expressly provide that the prisoner shall be subject to the prison disci-

pline; The Prison Law, §157 (quoted *supra*) provides that federal prisoners received in "the state prisons," *i. e.,* prisons, penitentiaries and reformatories, shall be received *"subject to the discipline of such prison,"* and the County Law, §96 (quoted *supra*) provides that *"the provisions of this article, relative to the mode of confining prisoners and convicts, shall apply to all persons so committed by any court or officer of the United States."*

What is the *discipline* of any of the penal institutions in the State of New York? What is the *mode* of confining them? *It invariably includes hard labor.*

The Prison Law (§171) provides:

> "§171. *Prisoners to be employed; products of labor of prisoners.* The superintendent of state prisons, the superintendents, managers and officials of all reformatories and penitentiaries in the state, shall, so far as practicable, cause all the prisoners in said institutions, who are physically capable thereof, to be employed at *hard labor,* for not to exceed eight hours of each day, other than Sundays and public holidays, but such *hard labor* shall be either for the purpose of production of supplies for said institutions, or for the state, or any political division thereof, or for any public institution owned or managed and controlled by the state, or any political division thereof; or for the purpose of industrial training and instruction, or partly for one, and partly for the other of such purposes."

The County Law (§93) provides:

> "§93. *Food and labor.* * * * [The] keeper shall cause each prisoner committed

to his jail for imprisonment under sentence to be *constantly employed at hard labor* when practicable, during every day, except Sunday, and the board of supervisors of the County may prescribe the kind of labor at which such prisoner shall be employed; * * *."

The New York City Charter (L. 1901, ch. 466, §700) provides:

"Every inmate of an institution under the charge of the commissioner [of correction; and this includes all the criminal jails in the city save houses of detention for children] whose age and health will permit shall be employed *in quarrying and cutting stone,* or in cultivating land under the control of the commissioner, or in manufacturing such articles as may be required for ordinary use of any department of the City of New York, *or in preparing and building sea walls* upon islands or other places belonging to the City of New York upon which public institutions now are or may hereafter be erected, *or in public works* carried on by any department of the City, or at such mechanical or other labor as shall be found from experience to be suited to the capacity of the individual."

And section 702 provides:

"The hours of labor required of any inmate of any institution under the charge of the commissioner shall be fixed by the commissioner. In case any person confined in any institution in the department shall refuse or neglect to perform the work alloted to him by the officer in charge of such institution * * * it shall be the duty of the officer in charge of such institution in

> which such person or persons is or are confined to punish him or them by solitary confinement, and by being fed on bread and water only, for such length of time as shall be considered necessary; * * *."

If "quarrying and cutting stone" and the other enumerated employments are not "hard labor," then surely because of the provisions permitting the commissioner not only to determine the kind but the hours of employment anyone who can be imprisoned there "is in danger of being subjected to an infamous punishment if convicted" (*Ex parte Wilson, supra*, p. 426).

The New York courts have construed these sections (*People ex rel. Gainance* v. *Platt*, 148 App. Div. 579). In that case Gainance was convicted of petit larceny as a first offender and sentenced to a term in the Albany County Penitentiary "at hard labor." He sued out a writ of *habeas corpus*, contending that the sentence was beyond the jurisdiction of the court since there was nothing in the statute defining the punishment for petit larceny which empowered the court to sentence him to "hard labor." But the court held that the words "at hard labor" added nothing, that because of section 171 of the Prison Law, *supra*, the sentence was necessarily one to hard labor whether the court said so or not. Indeed, this court has held that if the court has power to sentence to an institution where hard labor is part of the discipline the inclusion of the words in the sentence add nothing to it (*United States* v. *Pridgeon*, 153 U. S. 48, 62).

6.

We conclude, therefore, that since the court had power to sentence appellant to certain penal institutions of the State of New York, all of which require *hard labor* as part of the discipline, and that discipline would have been required of appellant, not only because of the statutes of the state which expressly so provide, but because of the comity between state and United States, of which Rev. Stat. 5539 is an expression, a comity that is limited only by the prohibition against contracting or hiring the labor of the prisoner, a comity which requires that the United States should not attempt to interfere in the management of the institutions of the state, the court had power to sentence appellant to a term at *hard labor,* which is an *infamous* punishment, which may not be inflicted except after indictment or presentment by grand jury.

7.

Imprisonment in either the institution to which appellant was actually sentenced, namely, the Essex County Penitentiary at Caldwell, New Jersey, or in the one to which the record avers he was sentenced, namely, the Essex County Jail at Newark, is imprisonment at hard labor.

In the court below both judge and counsel were in error as to the place selected by the Attorney General for the incarceration of federal prisoners sentenced by the United States District Court for the Eastern District of New York, to imprisonment for not exceeding a year. All believed it to be the Essex County *Jail* (pp. 3, 5, 7-8). We now chal-

lenge the record and assert that judge and counsel were in error; that the place designated by the Attorney General is the Essex County *Penitentiary.*

Since the designation of this prison by the Attorney General was no more than the regulation of an executive department, which federal courts must notice judicially (*Caha* v. *United States,* 152 U. S. 211, 221-222), this court will not be bound by the erroneous averments of the record, but will inform itself of the fact, inquiring, if necessary, of the Department of Justice (*Jones* v. *United States,* 137 U. S. 202, 214-216).

The Essex County "Penitentiary," so called, at Caldwell, is really a "workhouse," erected pursuant to the authority of an act of the New Jersey Legislature passed in 1799 (*Virtue* v. *Board of Freeholders,* 67 N. J. L. 139; 50 Atl. 360, 363). This Act (2 Gen. Stat. N. J. 1838) provides (§7):

> "That the master of such workhouse shall receive all such disorderly persons and others aforesaid, as shall be legally sent to him, and shall keep them to such work and labor as they are capable of and able to perform, during their continuance in the said house * * *."

The "work and labor" to which the inmates of the New Jersey workhouse are generally "kept" is "in breaking and crushing of stone and in road work" though this particular institution in Essex County seems to have a "more diversified industrial organization" than those in the other counties (*Barnes, History of New Jersey Penal Institutions,* p. 344). By any test the inmates of these workhouses are kept at hard labor.

But even if this sentence were what it purports to be, namely, a sentence to imprisonment in the County Jail of Essex County, it would be a sentence to hard labor.

Chapter 271 of the Laws of 1917 of New Jersey provides: "The board of chosen freeholders of any county in this state may cause to be employed within such county any and all prisoners in any county jail under sentence, or committed for non-payment of a fine and costs, or committed in default of bond for non-support of the family."

Now, what is "hard labor"? Bouvier (title "hard labor") defines it: "In those states where the penitentiary system has been adopted, convicts who are to be imprisoned as part of their punishment are sentenced to perform hard labor. This labor is not greater than many freemen perform voluntarily and the quantity required to be performed is not at all unreasonable. In the penitentiaries of Pennsylvania it consists in being employed in weaving, shoemaking, and such like employments." Anderson defines it (title "labor"): "State's prison convicts often are sentenced to perform 'hard labor.' This imports nothing more than ordinary industry at some mechanical trade." See also dissenting opinion of Mr. Justice Brandeis in *United States* v. *Moreland,* 248 U. S. 433, 444, describing the quality of the hard labor exacted at the workhouse of the District of Columbia.

"Hard labor" means *involuntary* labor—labor that reduces one to the status of a slave, the only involuntary servitude not abolished by the thirteenth amendment (*Ex parte Wilson,* 114 U. S. 417, 428-429).

So that the labor at which appellant would be "employed" at either the "Penitentiary" or the

County Jail of Essex County would be "hard labor" because it would be *involuntary servitude,* irrespective of whether it happened to be physically arduous or easy. Moreover, there seems to be no restriction as to the *kind* of labor the "freeholders" or the "master" can select. The statute gives them free rein. They can make it just as "hard," using the word in its ordinary sense, as they choose, and, as already noted, the test is not what is *likely* to be done, but what *may* be done.

8.

Any crime punishable by imprisonment is infamous.

Up to this point this brief has been concerned chiefly with the question of hard labor, because it has already been determined that hard labor is an infamous punishment.

But assuming that this offense is punishable by imprisonment only, does it follow that it is not infamous? What is the true test?

Whether the crime be called felony or misdemeanor is irrelevant. Prosecution by both indictment and information existed long before the adoption of the constitution. The origin of both was lost in antiquity (4 Blackstone 308-309). But in the growth of English law, developed as it was in struggles between king and people, it soon came to be recognized that information could be used in *misdemeanor* cases but could not be used in *felony* cases. The technical distinction between a felony and a misdemeanor was that conviction of felony resulted in forfeiture of goods and in the corruption of the blood, whereas conviction of mis-

demeanor did not carry these consequences. Nevertheless, it so happened that the punishment for felonies was inevitably death and punishment for misdemeanors was something else, when Blackstone wrote there were in England one hundred and sixty capital crimes. Because of this the real distinction between felony and misdemeanor soon came to be considered to be that a felony was a capital crime, and a misdemeanor was not, and both laity and law writers used this distinction, forgetting the original technical difference (4 Blackstone 94-95; 1 Bishop New Crim. Law, Sec. 615).

Following this distinction the writers, speaking of the cases in which informations could be used and of the cases in which indictments had to be used, said that it depended on whether the crime was a capital crime. Thus:

"But though, as my Lord Hale observes," wrote Bacon, "in all criminal causes the most regular and safe way, and most consonant to the statute of Magna Charta is by presentment or indictment of twelve sworn men, yet he admits that, for crimes *inferior to capital ones* the proceedings may be by information" (Abridgment Title Information A).

"But these informations are confined by the constitutional law to mere misdemeanors only; for, *whenever any capital offense is charged,* the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer for it," said Blackstone (Vol. 4, pp. 309-310).

Blackstone wrote only a few years before the adoption of our bill of rights and he well reflects the opinions of that day. It is clear, therefore, that at the time of the adoption of this amendment the law was this: A capital crime had to be prosecuted by indictment, any other crime could be prosecuted by information.

As we have said the requirement that the grand jury had to indict before a man could be prosecuted for capital crimes grew out of the struggles between the people and the kings. It was considered one of the great protections of the subject against kingly usurpation. To quote Blackstone again:

"But to find a bill there must be at least twelve of the jury agree, for, so tender is the law of England of the lives of its subjects that no man can be convicted at the suit of the King of any capital offense, unless by a unanimous voice of twenty-four of his equals or neighbors, that is, by at least twelve of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury of twelve more, finding him guilty upon his trial" (Vol. 4, p. 306).

"The founders of English law have, with excellent forecast, contrived that no man shall be called to answer the King for any capital crime, unless upon the peremptory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of any accusation, whether preferred in the shape of an indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion. So that the liberties of England can-

not but subsist so long as this *palladium* remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make) but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first (as doubtless *all arbitrary powers,* well executed, *are the most convenient*) yet let it be remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon the sacred bulwark of the nations are fundamentally opposite to the spirit of our constitution; and that, though *begun in trifles,* the precedent may gradually increase and spread to the utter disuse of jurors in questions of the most momentous concern" (Vol. 4, pp. 349-350).

And in 1784, five years before the adoption of our constitution, Erskine, in the Court of Kings Bench defending the Dean of St. Asaph said: "If a man were to commit a capital offense in the face of all the judges of England, their united authority could not put him upon his trial; they could file no complaint against him, even upon the records of the Supreme Criminal Court, but could only commit him for safe custody, which is equally competent to every common Justice of the Peace. The grand jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your lordships as witnesses on the back of it"

(quoted by Harlan, J., *Hurtando* v. *California,* 110 U. S. 516, 543).

This being the law at the time of the adoption of the constitution, did the drafters of the fifth amendment merely intend to preserve the law as theretofore it had been known in the mother country, or did they wish to improve somewhat on that?

Their experiences had shown them that the safeguards of the British Constitution as extolled by Blackstone and other writers were not quite enough. Their Declaration of Independence recited twenty-seven specifications of oppressions practiced in the colonies by the British king. One of these grievances was that "mock trials" had been fostered. They wished to form a more perfect state and to erect bulwarks that would be sufficient to protect the citizen from the arbitrary exercise of sovereign powers, whether by executive, by legislature or by court. They wished to protect the citizen against oppressive criminal prosecution; and they wanted these safeguards written into the fundamental law of the land where they would be safe from all attacks, open or subtle, made on the theory of *convenience* or otherwise. So they abolished *ex post facto* laws and bills of attainder *and they limited still further the permissive use of informations.* How? By *adding* to the requirement existing theretofore that indictments must be used for *capital crimes* the further requirements that *any other "infamous crime"* had to be so prosecuted.

Now what is an infamous crime? Not a felony. The constitution does not say "felony." It says "infamous crime." The term "felony" was known

as well then as it is now; indeed, the constitution itself uses the word at least twice (Art. I, Sec. 8; Art. 4, Sec. 2). There were and are no common law crimes against the United States so that whether an offense is a felony or a misdemeanor is wholly a matter of congressional definition. If Congress, by definition, can determine when informations may be used it can abolish the grand jury completely by defining every crime as a misdemeanor. It was not intended that this part of the constitution could be overridden by so facile a device as the choice of words made by the legislature. Therefore, the term "infamous crime" does not mean "felony." What does it mean?

Any crime conviction of which is presumed to damage a man's reputation in the community, is infamous. Where did the phrase "infamous crime" come from? As was pointed out in *Ex parte Wilson, supra,* p. 422, there are two kinds of infamy. The one concerns the "future credibility of the delinquent" and is discussed in the authorities dealing with the law of evidence. With this we have nothing to do. The other is "founded in the opinions of the people respecting the mode of punishment." *This is the one with which we are concerned. It is discussed in the authorities on the law of slander and this must have been the source from which the framers of the amendment selected the words "infamous crime," and shows what they meant by them.* An "infamous crime" is one, conviction of which is supposed *ipso facto* to destroy one's good name. Therefore, accusation of it implies damage, and special damage need not be averred or approved. In the opinions of the people it has been considered for a long time that

a crime punishable directly by imprisonment (*i. e.*, not imprisonment in default of the payment of a fine) in any sort of criminal jail or prison is "infamous." *Only offenses that are punishable by fine are not infamous* (*Odgers on Libel and Slander* [5th ed.], 38-43).

CONCLUSION.

The order appealed from should be reversed with directions to sustain the writ and discharge appellant from custody.

Dated, New York, April , 1923.

Respectfully submitted,

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